



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1995

Ms. Martha M. Dominguez
Interim Records Management Officer
Ysleta Independent School District
Administration & Cultural Arts Center
9600 Sims
El Paso, Texas 79925-7225

OR95-634

Dear Ms. Dominguez:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30240.

The Ysleta Independent School District (the "district") received a request for "a copy of the JD Edwards Finance systems contract that was approved by the board on" October 26, 1994. You submitted a copy of the contract and claim that portions of it are excepted from disclosure pursuant to sections 552.101, 552.104, and 552.110 of the Government Code as confidential trade secret and financial information. You make no argument as to why the information is excepted from disclosure; however, pursuant to section 552.305(c), you rely on arguments submitted by the affected third party, J.D. Edwards & Company ("JDE"). In accordance with section 552.305 of the Government Code, this office notified JDE of the request and solicited arguments in support of your suggestion that the requested contract is confidential. JDE has responded, contending that sections 552.104 and 552.110 of the Government Code authorize the district to withhold the requested information.¹

¹JDE attached to its brief a copy of its response to the district's request for proposals (RFP) on this matter and contends that, although the RFP response and addendum are mentioned as part of the transaction in the Memorandum of Understanding, the response to the RFP and the addendum to the response are not considered to be a part of the contract. The district, on the other hand has submitted as responsive to the request the actual contract and the addendum to the response to the RFP. We address in this ruling only the documents that the district has submitted as responsive to the request. Although JDE's attorney requests the opportunity to provide further detailed information regarding the addendum, we believe that JDE has sufficiently address the trade secret criteria with respect to the addendum. No additional briefing is necessary.

Section 552.104 excepts "information that, if released, would give advantage to a competitor or bidder." Section 552.104 is designed to protect the interests of the governmental body in a competitive bidding situation for a contract or benefit. Open Records Decision No. 592 (1991) at 8. It is not designed to protect the interests of private parties submitting information to a governmental body. *Id.* at 8-9. A governmental body must show specific competitive harm in a particular competitive situation. Open Records Decision No. 541 (1990) at 4. Once the bidding process has ceased and a contract has been awarded, section 552.104 will generally not except information submitted with a bid or the contract itself from disclosure. Open Records Decision No. 514 (1988). Because the district has awarded a contract in this case and you do not otherwise explain how the district will be harmed by release of this information, you may not withhold the information under section 552.104 of the Government Code.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. JDE does not assert that any portions of contract consist of confidential commercial or financial information. Accordingly, we need address only the trade secret branch of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from the Restatement of Torts, section 757 (1939). *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). A trade secret

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. *It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example, the amount or other terms of a secret bid for a contract. . . .* A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management. [Emphasis added.]

RESTATEMENT OF TORTS § 757 cmt. b (1939). The Restatement lists six factors we must consider when determining whether information is a trade secret:

(1) the extent to which the information is known outside of [the company's] business; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and to [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

Id. The governmental body or the company whose records are at issue must make a prima facie case for exception as a trade secret under section 552.110. *See* Open Records Decision No. 552 (1990) at 5.

JDE asserts and the contract itself (Clause 4A of the Software License Agreement and the Mutual Non-Disclosure Agreement) purports to except from disclosure the form, terms, and conditions of the contract as trade secret information. A governmental body cannot make information confidential simply by contracting to do so. Attorney General Opinion JM-672 (1987). Additionally, section 552.022 of the Government Code specifically makes public certain categories of information including

information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body, if the information is not otherwise made confidential by law.

Thus, this office has ruled that it is dubious whether the general terms of a contract with a state agency could ever constitute a trade secret. Open Records Decision Nos. 514 (1988), 541 (1990).

JDE claims that the information reflected in the terms and conditions of the contract is of great value to the company and its competitors.² JDE argues that release of the pricing information in particular *could* reveal to its competitors pricing and marketing methodology as well as estimations of prices JDE would propose in future bidding situations. While it is true that a price offered to any one customer might allow another to estimate a future proposal price, JDE has not explained how disclosure of this information would reveal pricing and marketing methodologies. Ordinarily, as Open Records Decision No. 319 (1982) instructs, information relating to pricing does not fall within the trade secret exception to required public disclosure. *Accord* Open Records Decision Nos. 306 (1982) at 3, 184 (1978) at 2.

²We note that JDE argues that it goes to great efforts to preserve the confidentiality of its prices and fees, "including not publishing lists of prices and products." However, Addendum A to the Software License Agreement states that "[s]oftware updates will be billed according to the schedule model

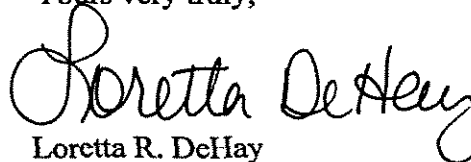
We find nothing in the requested pricing information indicating that the general rule enunciated in Open Records Decision No. 319 (1982) should not apply here. We do not find the pricing information to be "formula[e], pattern[s], device[s] or compilation[s] of information" that JDE uses in its business and that gives JDE an opportunity to obtain an advantage over its competitors. See RESTATEMENT OF TORTS *supra*; *Hyde Corp.*, 314 S.W.2d at 776. JDE's arguments are conclusory in nature and do not explain with any specificity how revealing price information could reveal pricing or marketing methodologies and strategies. Therefore, you may not withhold pricing information pursuant to section 552.110.

Some of the contract terms and conditions reveal lists and descriptions of products that JDE has contracted to provide as components of its technical solution offered in response to the request for proposal. JDE has met their prima facie burden that this information is excepted from disclosure as trade secret information. We have marked the information that you must withhold pursuant to section 552.110.

Finally, JDE asserts that the general form and standard provisions of its contract are trade secrets. As support for its claim, JDE's attorney cites *Gonzales v. Zamora*, 791 S.W.2d 258 (Tex. App.--Corpus Christi, 1990, no writ), wherein the court held that certain business forms may constitute trade secrets if they meet trade secret criteria. However, *Gonzales* is distinguishable from the situation here. In *Gonzales*, the court enjoined the defendants from using business forms they obtained from the plaintiff while in the plaintiff's employ. *Id.* at 260. The business forms were unique in that they were an essential part of the plaintiff's stock-in-trade and were specifically developed to fit the plaintiff's business needs. *Id.* at 265. In addition, the court found that the defendants' had used the plaintiff's forms to quickly and easily compete against the plaintiff. *Id.* at 266. Such is not the case here. We gather from reviewing the information submitted for our review that JDE is primarily in the business of creating financial software systems. JDE has not explained, nor do we believe, that obtaining the format and standard language of the contract, other than the product information described above, will aid a JDE competitor to provide the same software and technical assistance to clients that JDE provides. Therefore, except as noted above, the district must release the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/LMM/rho

Ref.: ID# 30240

Enclosures: Marked documents

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